Supreme Court, U.S.
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No. 96-395

In the Supreme Court of the United States

OCTOBER TERM, 1996

JAMES BROWN, PETITIONER

v.

TOGO WEST, SECRETARY OF THE ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether Section 114(2) of the Civil Rights Act of 1991 (1991 Act), 42 U.S.C. 2000e-16(d), which authorizes an award of interest against the federal government in Title VII actions, should be applied retroactively to award interest on attorney's fees that accrued before the effective date of the 1991 Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 78 F.3d 645. The opinion of the district court (Pet. App. 19a-26a) is reported at 868 F. Supp. 15.

JURISDICTION

The judgment of the court of appeals was entered on March 12, 1996. A petition for rehearing was denied on June 14, 1996. Pet. App. 30a-35a. The petition for a writ of certiorari was filed on September 12, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Until 1991, a prevailing plaintiff in an action against the federal government under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, could recover attorney's fees but could not recover interest on that award. *Library of Congress* v. *Shaw*, 478 U.S. 310 (1986). In 1991, Congress amended Title VII to provide, *inter alia*, for awards of interest against the United States with respect to backpay and attorney's fees. As amended by Section 114(2) of the Civil Rights Act of 1991 (1991 Act), Pub. L. No. 102-166, 105 Stat. 1079, Section 717(d) of Title VII now provides:

> The provisions of section 2000e-5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder, and the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties.

42 U.S.C. 2000e-16(d). The 1991 Act thus changed the rule announced in *Library of Congress* v. *Shaw*, *supra*, that interest was not available against the United States in such actions. See *Landgraf* v. *USI Film Products*, 511 U.S. 244, 251 (1994). The 1991 Act was signed by the President on November 21, 1991.

2. Petitioner is a civilian employee of the United States Army who prevailed on the merits of a Title VII suit.[1] In the suit, petitioner alleged that the Army discriminated against him in 1975 when it refused to hire him for a GS-9 position. Pet. App. 1a. After resolving the merits of petitioner's Title VII

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[1] See *Brown* v. *Marsh*, 713 F. Supp. 20 (D.D.C. 1989), aff'd, 918 F.2d 214 (D.C. Cir. 1990), cert. denied, 502 U.S. 810 (1991).

claim, the district court, on August 20, 1992, awarded petitioner attorney's fees and costs pursuant to 42 U.S.C. 2000e-5(k). The court reserved judgment on the question whether interest on those fees was available—and, if so, from what date—pending the expected determination by the Court of Appeals for the District of Columbia Circuit of the retroactivity of another provision of the 1991 Act in *Gersman* v. *Group Health Ass'n*, 975 F.2d 886 (1992), cert. denied, 114 S. Ct. 1642 (1994). Pet. App. 2a-3a, 20a.

3. In *Gersman*, the court of appeals held that Section 101 of the 1991 Act, 105 Stat. 1071, which expanded the scope of the term "make and enforce contracts" in 42 U.S.C. 1981, is not applicable retroactively to cases that were pending on the date of its enactment. Subsequently, in *Landgraf* v. *USI Film Products*, *supra*, this Court held that Section 102 of the 1991 Act, 105 Stat. 1072, which granted plaintiffs a right to recover compensatory and punitive damages for certain violations of Title VII, and provides for trial by jury where such damages are claimed, does not apply retroactively. In so holding, the Court stated that where a statute contains no express command with respect to its temporal reach, a court must first determine whether the statute, if applied to events that occurred before its enactment, would "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." 511 U.S. at 280. Where a provision would have such an effect on a party's substantive rights, it is not to be applied retroactively "absent clear congressional intent favoring such a result." *Ibid.*

The Court in *Landgraf* observed that a somewhat different analysis is applicable to attorney's-fee pro-

visions, which are "collateral to the main cause of action and uniquely separable from the cause of action to be proved at trial." 511 U.S. at 277 (internal quotation marks omitted). The Court thereby distinguished *Bradley* v. *Richmond Sch. Bd.*, 416 U.S. 696 (1974), in which it had applied retroactively the attorney's-fee provision of the Educational Amendments of 1972. The *Landgraf* Court explained that "the new fee statute [at issue in *Bradley*] simply 'd[id] not impose an additional or unforeseeable obligation,'" when viewed "[i]n light of the prior availability of a fee award, and the likelihood that fees would be assessed under pre-existing theories." 511 U.S. at 278.

4. In 1994, following the court of appeals' decision in *Gersman* and this Court's subsequent decision in *Landgraf*, petitioner renewed his request for interest on his award of attorney's fees. The Army agreed that it was liable for interest on fees that accrued between the effective date of the 1991 Act (November 21, 1991) and the date on which those fees and costs were paid. It contended, however, that petitioner was not entitled to any interest for the period prior to November 21, 1991. Pet. App. 20a-21a.

The district court held that Section 114(2) applies retroactively to provide interest on attorney's fees incurred before the passage of the 1991 Act. The court reasoned that because Title VII plaintiffs were entitled to interest on attorney's fees in suits against private defendants before the enactment of Section 114(2), and because fee awards are "uniquely separable from the cause of action to be proved at trial" (Pet. App. 24a), retroactive application of Section 114(2) would not affect the parties' substantive rights. In the court's view, *Landgraf* and *Bradley* therefore

require that the provision be applied to all of petitioner's attorney's fees. Pet. App. 23a-24a.

5. The court of appeals reversed. Observing that Section 114(2) is a waiver of sovereign immunity and that such waivers must be strictly construed, the court concluded that Section 114(2) could not be applied retroactively absent clear evidence that Congress intended that result. Pet. App. 2a. Finding clear evidence of such an intent to be "[w]anting," the court reversed the award of interest on petitioner's pre-1991 Act attorney's fees and expenses. *Ibid.*

The court rejected the proposition that *Bradley* requires retroactive application of Section 114(2). It explained that "the principle of *Bradley* is applicable only to nonsubstantive matters; it does not displace 'the traditional presumption against applying statutes affecting substantive rights, liabilities or duties to conduct arising before their enactment.'" Pet. App. 6a (quoting *Landgraf*, 511 U.S. at 278). Although, in the court's view, "one might well infer" that Section 114(2) "would * * * fall within the play-it-as-it-lies principle of *Bradley*" (Pet. App. 6a), the court found the *Bradley* presumption to be inapplicable where, as here, the statute at issue entails a waiver of sovereign immunity. *Id.* at 18a.

Relying on *Library of Congress* v. *Shaw*, *supra*, and *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 685-686 (1983), the court concluded that the rule requiring strict construction of such waivers controlled its analysis here, both in determining whether the United States has consented to be sued, "and in defining the scope of that consent." Pet. App. 7a. While Section 114(2) contains an express waiver of sovereign immunity from interest awards, "Congress said nothing to indicate that the provision should be

applied retroactively." Pet. App. 12a. The court therefore held that to apply Section 114(2) retroactively "would be to impose upon the United States a liability to which it has not explicitly consented." Pet. App. 18a.

6. Petitioner sought rehearing. In denying the petition for rehearing, the court of appeals rejected petitioner's claim that *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990), requires a different result.[2] In *Irwin*, the Court held that equitable tolling principles apply to Title VII's statute of limitations in suits against the government. The court of appeals distinguished *Irwin* on the ground that "[a] clause that supplies a statutory time limit is not itself a waiver of sovereign immunity; it is rather a condition subsequent that the Congress may place upon the waiver." Pet. App. 32a. Here, by contrast, the pertinent question is "whether the waiver of sovereign immunity for interest applies in the first place." *Id.* at 33a.

ARGUMENT

1. Petitioner contends (*e.g.*, Pet. 12, 21) that, under this Court's decision in *Landgraf*, Section 114(2) must be applied retroactively to award interest on attorney's fees that were incurred prior to November 21, 1991. In *Landgraf*, the Court stated that where a newly enacted statute "would impair rights a party possessed when he acted, increase a party's liability

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[2] This Court announced its decision in *Irwin* on December 3, 1990—before the enactment of the 1991 Act, and before the district court's and court of appeals' decisions in this case. The court of appeals "entertain[ed] [petitioner's] * * * objection, however, because his reliance upon *Irwin* d[id] not present a new (and therefore untimely) argument." Pet. App. 31a.

for past conduct, or impose new duties with respect to transactions already completed," it cannot be applied retroactively "absent clear congressional intent favoring such a result." *Landgraf* v. *USI Film Products*, 511 U.S. 244, 280 (1994). The Court therefore held that Section 102 of the 1991 Act, which authorized punitive damage awards against private defendants and compensatory damage awards against defendants generally, could not be applied retroactively. The Court explained that Section 102 would

> undoubtedly impose on employers found liable a 'new disability' in respect to past events. * * * The *extent* of a party's liability, in the civil context as well as the criminal, is an important legal consequence that cannot be ignored.

511 U.S. at 283-284.

Before the enactment of Section 114(2), the federal government was immune from paying interest on Title VII backpay and attorney's-fee awards. As the Court recognized in *Library of Congress* v. *Shaw*, interest on monetary awards against the United States is an additional element of damages traceable to the underlying unlawful conduct at issue. 478 U.S. 310, 314 (1986). By waiving sovereign immunity with respect to interest on such awards, Section 114(2) expanded the rights of prevailing plaintiffs in Title VII cases, thereby increasing the "*extent* of [the government's] liability." *Landgraf*, 511 U.S. at 283. *Landgraf* therefore bars the provision's retroactive application, absent a clear expression of contrary legislative intent. The court of appeals correctly held (Pet. App. 12a) that no evidence of such intent exists.

Accordingly, every court of appeals that has addressed the question has held that Section 114 may

not be applied retroactively. See *Woolf* v. *Bowles*, 57 F.3d 407, 410 (4th Cir. 1995) ("[R]equiring the federal government to pay interest would disrupt the long-standing expectation created by the no-interest rule, and thus unquestionably would impose an important new legal burden on the federal government."); *Edwards* v. *Lujan*, 40 F.3d 1152, 1154 & n.1 (10th Cir. 1994), cert. denied, 116 S. Ct. 417 (1996) (the rationale of *Landgraf* supports a presumption against retroactive application of Section 114 to backpay award); *Huey* v. *Sullivan*, 971 F.2d 1362, 1365 (8th Cir. 1992) (pre-*Landgraf* ruling that Section 114 does not apply retroactively to interest on backpay), cert. denied, 114 S. Ct. 1642 (1994). Petitioner contends that *Woolf*, *Edwards*, and *Huey* are distinguishable because they concerned interest on backpay awards that was "compensatory in nature," whereas interest on attorney's fees is "collateral to the main cause of action" and "separable from the cause of action to be proved at trial." Pet. 21. That argument is unavailing because the interest at issue here is not an element of "attorney's fees," as defined by Section 113 of the 1991 Act, 105 Stat. 1079 (42 U.S.C. 2000e-5(k)). Rather, it derives from Section 114, which applies to all elements of the judgment award in Title VII cases, including both backpay and attorney's fees. Petitioner's construction of Section 114 would require the untenable conclusion that Congress intended for the same provision to be retroactive when applied to attorney's fees, but purely prospective when applied to backpay awards.

Contrary to petitioner's contention (Pet. 11-13 & n.7, 21), *Bradley* v. *Richmond Sch. Bd.* is not to the contrary. In *Bradley*, the Court held that the attorney's-fee provision of the Education Amend-

ments of 1972 applies retroactively to impose fees in cases where legal services were performed before the statute was passed. The Court in *Landgraf* made clear, however, that *Bradley* "did not alter the well-settled presumption against application of the class of new statutes that would have genuinely 'retroactive' effect." *Landgraf*, 511 U.S. at 277. As we have explained, interest on attorney's fees is available only through Section 114. By its own terms, Section 114 is not an element of attorney's fees but, rather, is expressly intended "to *compensate* for delay" in payment. The Court in *Library of Congress* v. *Shaw*, moreover, reiterated "the historic[] view that interest is an element of damages separate from damages on the substantive claim." 478 U.S. at 314. Retroactive application of the interest provision in Section 114(2) would impermissibly "increase [the government's] liability for past conduct" in the absence of clear evidence that Congress intended that result. *Landgraf*, 511 U.S. at 280.[3]

2. The court of appeals held that the doctrine of sovereign immunity bars the retroactive application

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[3] Petitioner's analogy (Pet. 20) to expert fees, which were added to Section 113 of the 1991 Act as a component of attorney's fees, is misplaced. Attorney's fees are not subject to the usual presumption against retroactivity because such fees are "collateral" to the main cause of action. *Landgraf*, 511 U.S. at 277. Unlike the interest liability contained in Section 114, Section 113 specifically makes expert fees an element of attorney's fees, for which the United States was liable before the 1991 Act. See *Library of Congress* v. *Shaw*, 478 U.S. at 319 ("Title VII's provision making the United States liable 'the same as a private person' waives the Government's immunity from attorney's fees, *but not interest*.") (emphasis added).

of Section 114(2).[4] As petitioner recognizes (Pet. 16), "a waiver of the Government's sovereign immunity will be strictly construed *in terms of scope*, in favor of the sovereign." *Lane* v. *Pena*, 116 S. Ct. 2092, 2096 (1996) (emphasis added). Any ambiguity in such a waiver must be strictly construed in favor of the government. See, *e.g.*, *Library of Congress* v. *Shaw*, 478 U.S. at 318; *Ruckelshaus* v. *Sierra Club*, 463 U.S. at 685. Section 114(2) applies solely to suits against the federal government. Although that provision clearly waived sovereign immunity for interest against the government in Title VII cases, Congress did not expressly make the provision retroactive, so as to allow for interest on judgments entered before its effective date.[5]

Petitioner contends (Pet. 18-19) that the decision below "conflicts" with *Woolf*, *Edwards*, and *Huey* be-

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[4] In our briefs before the court of appeals, we relied solely on this Court's decision in *Landgraf* to support our position that Section 114(2) does not apply retroactively. However, in response to the request of the court of appeals that the parties be prepared at oral argument to address the application of the doctrine of sovereign immunity to the retroactivity question (see Pet. 5), the government argued that principles of sovereign immunity also were a bar to retroactivity in this case.

[5] Petitioner's reliance (Pet. 17-18) on *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990), is misplaced. In *Irwin*, the Court held that the doctrine of equitable tolling applies to Title VII's limitations period in suits against the United States. The court below distinguished *Irwin* on the ground that the "waiver of sovereign immunity in Title VII clearly applied to the conduct and to the parties in *Irwin*; the issue was whether the plaintiff had satisfied the condition subsequent" that Congress placed upon the waiver. "In this case, the issue is whether the waiver of sovereign immunity for interest applies in the first place." Pet. App. 32a-33a.

cause those cases did not principally rely on sovereign immunity principles to conclude that Section 114(2) does not apply retroactively. The fact remains, however, that no court of appeals has ever held that Section 114(2) applies retroactively. Indeed, the court in *Huey* expressly stated that "the policy requiring that waivers of sovereign immunity be construed strictly in favor of the United States * * * makes a finding of no retroactivity even more compelling in this case." 971 F.2d at 1365-1366. There is no conflict among the circuits with respect to the question presented here. See Pet. i; see also *Texas* v. *Hopwood*, 116 S. Ct. 2581, 2582 (1996) (Ginsburg, J., respecting the denial of the petition for a writ of certiorari) ("[T]his Court * * * reviews judgments, not opinions.") (quoting *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984)). Further review therefore is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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